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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

PETITIONER'S REPLY BRIEF

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Respondents.

PETITIONER'S REPLY BRIEF

I.

THE PETITION PRESENTS A SUBSTANTIAL, UNRESOLVED FEDERAL QUESTION

Respondents assert that no substantial federal question is presented by the petition, yet respondents did not even discuss the decisions by the highest courts of other states and by the federal circuit courts which are in conflict with the decision below.[1]

Also, contrary to respondents' contentions, none of this Court's prior decisions suggests or holds that the government employer charged by law with making employment decisions is constitutionally prohibited from dismissing striking employees merely because it also has collective bargaining responsibilities. The interests to be balanced in a criminal prosecution are not synonymous with those required in civil cases.

The Seventh Circuit, affirming a decision of the Western District of Wisconsin, so held in *Suckle v. Madison General Hospital*, 499 F.2d 1364, 1366 (7th Cir. 1974):

> "We agree with Judge Doyle that lodging the decision-making function in the medical staff was constitutionally permissible. As he stated:
>
> > 'Implicit in this conclusion is the proposition that the Fourteenth Amendment is not automatically offended despite the realistic possibility, even probability, that among the members of the medical staff there are some who harbor resentment or jealousy, and others who have formed personal evaluations in the court of experience over the

[1]In addition to the cases cited at pages 11-12 of the Petition for Certiorari, the decision below is also in conflict with *Federation of Teachers v. Community College*, Nos. 74-2323 and 2324, (6th Cir. July 2, 1975), unofficially reported at 89 L.R.R.M. 2865.

> years with the physician in question. Indeed, there may well be some members of the staff who have not been free of advance impressions, whether accurate or distorted, with respect to the merits of the controversy, but in my view, this circumstance should not automatically bar them from participation in the decision-making process. I do not believe that the constitution requires the decision-making process to be as antiseptic in this context as it is required to be, for example, in a criminal prosecution.' 362 F.Supp. at 1209-1210."

The decision below affects not only all government employees in Wisconsin but has an impact on most, if not all, states and the federal government. Public employee strikes are not confined to the small community of Hortonville, Wisconsin.

Collective bargaining in the public sector is a system consciously designed to enhance the local government's ability to respond to the needs of its constituency and its employees. Each government entity must decide how to respond to a strike and how to perform its functions in strike situations. The ability to make any such necessary policy decisions is unclear until this decision is reviewed.

Legislatures which may wish to adopt, amend or repeal statutes covering collective bargaining and public employee strikes also need to know what, if any, constitutional limitation there is on the right of a public employer to make a policy decision that involves terminating and replacing strikers.

II.

THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT

The pendency of some type of further state proceedings does not mean that the judgment below is not final under 28 U.S.C. §1257(3). *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 246 (1975); *North Dakota State Pharmacy Bd. v. Snyder's Drug Stores*, 414 U.S. 156 (1974); *Hudson Dist., Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964).

Particularly where the further state court proceedings are separate in form, this Court has held judgments final. E. g., *Madruga v. Superior Court*, 346 U.S. 556 (1954); *Rescue Army v. Municipal Court*, 331 U.S. 549, 565-68 (1947). The pending state court proceedings referred to by Respondents are collateral to this litigation. Upon holding that the elected school board was a constitutionally deficient decision maker, the Wisconsin Supreme Court legislated a new proceeding. That proceeding is to be commenced by *petition* "in any court of record in the country where the school district . . . is located." (p. Ap. 29* 66 Wis.2d at 498.)

To allow Respondents to use the newly created right, the court below authorized amended pleadings before the trial court. That Respondents chose to commence a proceeding to enforce the right created by the Wisconsin Supreme Court does not affect the finality of the judgment.[2] Such enforcement proceedings are irrelevant to the question of finality under 28 U.S.C. §1257. *LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18, 21 (1949). *Allegheny Ludlum Steel Corp. v. Kelly*, 330 U.S. 767 (1947).

*References are to the Wisconsin Supreme Court's opinion. Pagination is to the appendix to the Petition For A Writ Of Certiorari.

[2]The characterization of the judgment below as a denial of summary judgment does not determine this Court's jurisdiction. Had Respondents rather than Petitioners sought summary judgment the result below would have been the same: Respondents would have won only the right to commence a new proceeding. Petitioners would be seeking review of a judgment of the highest court of Wisconsin *entered against* them. This Court's appellate jurisdiction does not hinge on such labels. *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 382 (1953); *Dept. of Banking v. Pink*, 317 U.S. 264, 268 (1942).

Respondents' position is that the state trial court is to substitute its judgment for that of the school board. The question ripe for review by this Court is *who* is constitutionally entitled to make certain policy decisions. That question is separate and independent of the factual and legal issues involved in determining *what* was the proper response to the strike and is final for the purposes of 28 U.S.C. §1257. See *American Radio Assn. v. Mobile S.S. Assn.*, 419 U.S. 215, 217 (1974); *Local No. 438 v. Curry*, 371 U.S. 542 (1963).

Nor does review at this time offend federal/state relationships. This Court is not being asked to review any matter which the Wisconsin Supreme Court has not considered. No facts to be adduced at the new proceeding will affect the due process issue or the equal protection claim which Respondents seek to have reviewed in No. 1638. Decisions on controlling questions of law, anterior to and separate from the merits are final under 28 U.S.C. §1257. *Miami Herald Publishing Co. v. Tornillo, supra; Harris v. Washington*, 404 U.S. 55 (1971); *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 418 (1971).

The Court below itself recognized that efforts to have this Court review the judgment are appropriate now, and granted a ninety day stay to allow the Petition to be filed.[3]

[3]In declining to continue the stay the Wisconsin Supreme Court appears to have read 28 U.S.C. § 2101 (f) as depriving it of jurisdiction upon the docketing of a Petition for Certiorari.

Further, the question of whether the school board was a constitutionally permissible decisionmaker may be lost in the new proceeding, and will certainly be lost if Petitioners prevail at trial. To preserve that issue Petitioners may have to attempt to ignore the Wisconsin Supreme Court decision and attempts to plead that the trial court lacks subject matter jurisdiction. This Court has avoided placing a petitioner in the position of having to defy the supreme court of its state, in applying 28 U.S.C. §1257. *North Dakota State Pharmacy Bd. v. Snyder's Drug Stores, supra. Cf., Richardson v. Ramirez,* 418 U.S. 24, 35 (1975). Finally, if the trial court's jurisdiction to proceed is raised, a later appeal could be affirmed on state grounds because of the nature of the proceeding created by the Wisconsin Supreme Court. In that event, review of the federal question by this Court would be lost.

III.

THE DECISION BELOW RESTS ENTIRELY ON THE FOURTEENTH AMENDMENT

In opposing the Petition For A Writ Of Certiorari, Respondents have *not* contended that the decision below rests on state grounds. However, in declining to extend the stay granted below, Mr. Justice Rehnquist suggested that there may be some doubt as to whether the judgment rested solely on a construction of the Fourteenth Amendment. No. A-133 (74-1606) Aug. 18, 1975 (Mr. Justice Rehnquist in chambers).

The state constitution[4] was not argued before the trial

[4]Article I of the Wisconsin Constitution was referred to in the original pleadings. (p. Ap. 6, 54, 66 Wis.2d at 477.) Article I contains twenty-four sections covering, *inter alia,* free speech, prohibitions on slavery,

court (p. Ap. 57-69) or the Wisconsin Supreme Court. (p. Ap. 16-25, 66 Wis.2d at 487-94.) In fact the Wisconsin Supreme Court prefaces its entire discussion of the due process issue with only a reference to the Fourteenth Amendment. (p. Ap. 1617, 66 Wis.2d at 487.) No reference was made to Art. I of the Wisconsin Constitution or to a prior decision construing that article[5] any place in that discussion. Only this Court's opinions and the opinions of lower federal courts construing the Fourteenth Amendment are cited by the Wisconsin Supreme Court.

Even assuming, *arguendo,* that the Wisconsin Supreme Court could have reached the same result by applying some section of Art. I of the Wisconsin Constitution,[6] this case is nonetheless properly before this Court for review. *Indiana ex rel Anderson v. Brand,* 303 U.S. 95 (1938).

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bail requirements, property rights for aliens, treason, imprisonment for debt and the use of school buildings. What section of Art. I Respondents originally thought were violated was not disclosed to the courts below or petitioners.

[5]The Wisconsin Supreme Court did cite *General Electric Co. v. W.E.R.B.,* 3 Wis.2d 227, 241, 88 N.W.2d 691 (1958) and *Durkin v. Board of Police and Fire Comm.,* 48 Wis.2d 112, 122, 180 N.W.2d 1 (1970). The state constitution was not raised in either case. In *General Electric* this Court's decisions under the Fourteenth Amendment were used by analogy to construe the state administrative procedure act, which is not involved here. In *Durkin* the court cited *General Electric* for the proposition that an administrative body was required to notify an individual of the charges against him.

[6]The Wisconsin Supreme Court has compared Art. 1, sec. 1 of the Wisconsin Constitution to this Court's decisions under the Fourteenth Amendment in a substantive due process, but not a procedural due process context. E.g., *Chicago & N.W. Ry. v. LaFollette,* 43 Wis.2d 631, 642-43, 169 N.W.2d 441, 445-46 (1969).

Also, Wisconsin's "Magna Carta" provision, Art. I, sec. 9, under which the court created the new proceeding, is not applicable until *after* a legal right is established. See, *Ross v. Ebert,* 275 Wis. 573, 82 N.W.2d 315 (1956); *Scholberg v. Itnyre,* 264 Wis. 211, 58 N.W.2d 698 (1952). Not until the Wisconsin Supreme Court invalidated the school board's role as decisionmaker did it turn to Art. 1, sec. 9.

CONCLUSION

For the reasons stated above and in the Petition for a Writ of Certiorari, Petitioners respectfully urge this Court to issue a Writ of Certiorari to the Wisconsin Supreme Court.

Respectfully submitted,

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